IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

Nos. 98-1233, 98-1291 & 98-1468

RANDALL GENDRON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97-CV-4312-JPG—**J. Phil Gilbert**, *Chief Judge.*

RANDALL GENDRON,

Petitioner-Appellant,

v.

UNITED STATES OF AMERICA,

Respondent-Appellee.

Appeal from the United States District Court
for the Southern District of Illinois.
No. 97-CV-4312-JPG—**J. Phil Gilbert**, *Chief Judge.*

JAMES P. GLASS,

Petitioner-Appellant,

v.

RODNEY J. AHITOW,

Respondent-Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 98-1003—**Michael M. Mihm**, *Chief Judge*.

SUBMITTED JULY 30, 1998—DECIDED AUGUST 20, 1998

Before FLAUM, KANNE, and EVANS, *Circuit Judges*.

PER CURIUM. Prior to the Antiterrorism and Effective Death Penalty Act (AEDPA), a prisoner possessed virtually unlimited amounts of time to file a first petition for collateral review under 28 U.S.C. §§ 2254 and 2255. In an attempt to curb the protracted nature of such litigation, Congress established a one-year period of limitations. *See* 28 U.S.C. §§ 2244(d), 2255. We have consolidated for consideration and decision three appeals in order to clarify how district courts are to apply the new periods of limitation.

Randall Gendron's appeals, Nos. 98-1233 and 98-1291, arose from the following facts. On November 8, 1995, a jury in federal district court convicted Gendron of conspiracy to distribute and to possess with intent to distribute cocaine. Gendron's conviction and sentence were affirmed by this court on October 8, 1996. On October 21, 1996, Gendron filed a petition for rehearing, which this court denied on October 25, 1996. Subsequently, on November 4, 1996, this court issued the mandate. Gendron never filed a petition for certiorari with the United States Supreme Court, and he waited until November 18, 1997, to file his § 2255 motion to vacate.

The district court determined "the date that the mandate is returned from the Court of Appeals is the latest possible date that the prisoner's conviction would become final." Accordingly, the district court used the November 4, 1996 date as the starting point for the one-year limitations period. Because Gendron's motion to vacate was not mailed until November 18, 1997, the district court concluded that

the period of limitations had run; thus, the court denied the petition and dismissed the action with prejudice.

Gendron argues that even though he elected not to file a petition for certiorari with the Supreme Court, the district court should have excluded from the limitations period the 90 days he had to file such a petition. *See* Sup. Ct. R. 13. According to Gendron, the period of limitations should start to run, not from the date our mandate was issued, but on the date that review by the Supreme Court was precluded. *See id.* at 13.1, 13.3. Therefore, Gendron insists, he had until January 25, 1998, to file his § 2255 motion. *See id.* at 13.3. Because his motion was received by the district court on November 19, 1997, Gendron argues that his petition was timely filed.

In relevant part, the AEDPA amended § 2255 by adding the following language:

> A 1-year period of limitation shall apply to a motion under this section. The limitation period shall run from the latest of—
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> > (1) the date on which the judgment of conviction becomes final; . . .

We are left with the question of when a judgment is to be considered final. The Supreme Court has addressed the question of finality in the context of retroactivity. The Court defined a conviction as being final when "a judgment of conviction has been rendered, the availability of appeal exhausted, and the time for a petition for certiorari elapsed or a petition for certiorari finally denied." *Griffith v. Kentucky*, 479 U.S. 314, 321 n. 6 (1987) (citing *United States v. Johnson*, 457 U.S. 537, 542 n. 8 (1982)). But, while the Court's definition can be used for guidance, Congress has the authority to independently determine the standards to be applied under §§ 2244 and 2255. *See Milwaukee v. Illinois*, 451 U.S. 304, 317 (1981) ("[W]e start with the assumption that it is for Congress, not federal courts, to articulate the appropriate standards to be applied as a matter of federal law."). In this regard, it is helpful to com-

pare the two periods of limitation contained in §§ 2244(d) and 2255.

As stated above, the period of limitations for § 2255 runs from "the date on which the judgment of conviction becomes final." 28 U.S.C. § 2255. In comparison, the period of limitations for petitions filed under § 2254 begins to run from "the date on which the judgment became final by the conclusion of direct review *or the expiration of time for seeking such review*[.]" 28 U.S.C. § 2244(d)(1)(A) (emphasis added). Thus, in drafting § 2244, Congress explicitly included the time for seeking leave to appeal with a state supreme court even if the petitioner elected not to do so.[1] Such additional language is lacking in § 2255.

Where Congress includes particular language in one section of an act but omits it in another section of the same act, it is presumed that Congress intended to exclude the language, and the language will not be implied where it has been excluded. *See Hohn v. United States*, 118 S. Ct. 1969, 1977 (1998) (citations omitted); *McNutt v. The Board of Trustees of the Univ. of Ill.*, 141 F.3d 706, 709 (1998) (citing *Russello v. United States*, 464 U.S. 16, 23 (1983)). In § 2244, Congress expressly included the period for seeking review whether or not a petitioner elected to avail himself of the opportunity. Because similar language is absent in § 2255, we conclude that Congress intended to treat the period of limitations differently under the two sections. Accordingly, we hold that federal prisoners who decide not to seek certiorari with the Supreme Court will have the period of limitations begin to run on the date this court issues the mandate in their direct criminal appeal. Any other reading of the statutes would render the additional language in § 2244 meaningless, a result we must avoid. *See Hohn*, 118 S. Ct. at 1976 ("We are reluctant to adopt

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[1] We leave open the question of whether § 2244's "direct review" includes the time a state prisoner, who files for leave to appeal to a state supreme court, is given to seek certiorari with the United States Supreme Court.

a construction making another statutory provision superfluous.") (citations omitted). The district court correctly dismissed Gendron's § 2255 motion as untimely, and we, therefore, decline to issue a certificate of appealability.

One additional matter raised by Gendron, in appeal No. 98-1291, is the district court's denial of his motion for reconsideration under Federal Rule of Civil Procedure 59(e). We review such a decision for abuse of discretion. *See Britton v. Swift Trans. Co.*, 127 F.3d 616, 618 (7th Cir. 1997). A Rule 59(e) motion may only be granted if there has been a mistake of law or fact or if there is newly discovered evidence not previously available. *See Figgie Int'l, Inc. v. Miller*, 966 F.2d 1178, 1180 (7th Cir. 1992). As the district court correctly applied the period of limitations, he did not abuse his discretion in denying Gendron's Rule 59(e) motion.

We turn now to the third consolidated case. In No. 98-1468, James Glass was convicted of three counts of aggravated sexual assault and one count of aggravated sexual abuse. Glass appealed to the Illinois Appellate Court, which affirmed his conviction and sentence on December 28, 1992. There is no indication that Glass ever sought leave to appeal his conviction to the Illinois Supreme Court. Thus, Glass's direct appeal ended on January 27, 1993, when his time to petition for leave to appeal to the Illinois Supreme Court expired.[2] *See* 28 U.S.C. § 2244(d)(1)(A); Il. St. S. Ct. R. 606(b).

On August 18, 1994, approximately a year and a half later, Glass collaterally attacked his sentence and conviction through a properly filed post-conviction petition in the Illinois trial court. On September 20, 1994, his petition

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[2] We reiterate that we do not address the question of whether a prisoner who filed for leave to appeal to the state supreme court would have the time for filing certiorari with the United States Supreme Court included in his "direct review" for the purposes of § 2244.

was denied. Glass appealed this determination, and on February 3, 1997, the Illinois Appellate Court affirmed the denial. Glass then filed for leave to appeal to the Illinois Supreme Court which was denied on June 4, 1997. On January 12, 1998, Glass filed his present habeas petition pursuant to § 2254.

Here too, the district court determined that Glass filed his petition after the period of limitations expired and dismissed the petition. In concluding that Glass had waited more than one year before filing his § 2254 habeas petition, the district court counted not only the 7-month period between the conclusion of his post-conviction proceedings[3] and the filing of his federal habeas petition, but also the 18-month period between the conclusion of Glass's direct review in 1993 and the filing of his state post-conviction proceedings in 1994. According to the district court, Glass had waited 25 months to file his § 2254 petition.

In *Lindh v. Murphy*, 117 S. Ct. 2059, 2068 (1997), the Supreme Court concluded that Congress intend for most of the AEDPA provisions to apply only to cases filed after April 24, 1996. We agree with the Tenth Circuit that this holding extends to the period of limitations contained in § 2244. *See Hoggro v. Boone*, No. 97-6383, 1998 WL 419727, at *3 (10th Cir. June 24, 1998). Thus, for § 2254 petitions the period of limitations does not begin to run until April 24, 1996, the AEDPA's enactment date. *See id.* Consequently, the district court incorrectly counted the period between the conclusion of Glass's direct review in 1993 and the commencement of post-conviction proceedings in 1994. Because Glass had a properly filed post-conviction petition when the AEDPA was enacted, his period of limitations tolled at least until June 4, 1997,

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[3] The district court correctly concluded that the period of limitations tolled while Glass's properly filed post-conviction proceedings were under consideration. *See* 28 U.S.C. § 2244(d)(2).

when the Illinois Supreme Court denied leave to appeal.[4] Accordingly, Glass's § 2254 petition, filed on January 12, 1998, was timely. We grant Glass's request for a certificate of appealability and vacate the district court's dismissal of the petition. This case is remanded for consideration of the merits of Glass's petition.

In summary, in appeals Nos. 98-1233 and 98-1291, we find that Gendron did not make a substantial showing of the denial of a constitutional right and DENY his request for a certificate of appealability. *See* 28 U.S.C. § 2253(c)(2). In appeal No. 98-1468, we GRANT Glass's request for a certificate of appealability under 28 U.S.C. §§ 2253(c)(1)(A) & (c)(2), VACATE the dismissal of his habeas corpus petition, and REMAND the case for further proceedings.

A true Copy:

Teste:

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Clerk of the United States Court of Appeals for the Seventh Circuit

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[4] In his application for a certificate of appealability, Glass first raised to the district court the claim that he pursued a writ of certiorari with the United States Supreme Court following the denial of his state post-conviction petition, which he claimed was denied on October 1, 1997. Actually, it was denied on October 6, 1997. *See Glass v. Illinois*, 118 S. Ct. 228 (1997). Whether we use June 4, 1997, or October 6, 1997, Glass's petition was timely.

UNITED STATES COURT OF APPEALS
For the Seventh Circuit
Chicago, Illinois 60604

Submitted September 4, 1998
Decided December 8, 1998

Before

Hon. JOEL M. FLAUM, *Circuit Judge*
Hon. MICHAEL S. KANNE, *Circuit Judge*
Hon. TERENCE T. EVANS, *Circuit Judge*

No. 98-1468

JAMES P. GLASS,

Petitioner/Appellant,

v.

RODNEY J. AHITOW,

Respondent/Appellee.

Appeal from the United States District Court
for the Central District of Illinois.
No. 98-1003—Michael M. Mihm, Chief Judge.

ORDER

Respondent's Petition for Rehearing with Suggestion for Rehearing Enbanc is **Denied**.

[Entered January 16, 1998]

UNITED STATES DISTRICT COURT
CENTRAL DISTRICT OF ILLINOIS

JAMES P. GLASS, Petitioner,	)	
v.	)	Case No. 98-1003
RODNEY J. AHITOW, Warden, Respondent.	)	

ORDER

This matter is before the Court on James P. Glass' ("Glass") Motion to Proceed In Forma Pauperis, Motion for Appointment of Counsel, and Petition for Writ of Habeas Corpus pursuant to 28 U.S.C. §2254. For the reasons set forth below, Petitioner's Motion to Proceed In Forma Pauperis [#1] is DENIED, the Motion for Appointment of Counsel [#2] is DENIED, and the Petition for Writ of Habeas Corpus [#3] is DISMISSED.

Background

Glass is currently in the custody of Respondent, Rodney Ahitow, Warden of the Illinois River Correctional Center in Canton, Illinois. On October 17, 1991, Glass was convicted on three counts of aggravated sexual assault and one count of aggravated sexual abuse. He was sentenced to three consecutive terms of 25 years and one concurrent term of 7 1/2 years.

Glass appealed to the Illinois Appellate Court, Fourth District, which affirmed his conviction and sentence on December 28, 1992. There is no indication that he ever filed for leave to appeal to the Illinois Supreme Court on his direct appeal.[1] Thus, Glass' direct appeal of his conviction appears to have terminated on January 27, 1993 when his time to petition for leave to appeal to the Illinois Supreme Court expired.

On August 18, 1994, more than a year and a half later, Glass initiated an attempt to collaterally attack his sentence and conviction through a post-conviction petition pursuant to 725 ILCS 5/122-1 in the Circuit Court of the Eleventh Judicial Circuit, McLean County. On September 20, 1994, his petition was denied. Glass appealed this determination, and on February 3, 1997, the Illinois Appellate Court, Fourth District, affirmed the trial court's determination. Glass then filed a petition for leave to appeal to the Illinois Supreme Court which was denied on June 4, 1997.

Petitioner filed the instant action on January 12, 1998. This Order follows.

Discussion

There are statutory time limits which govern whether a district court can entertain a petition for writ of habeas corpus. The present case is covered by 28 U.S.C. §2244, which states in relevant part:

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[1] Upon inquiry to the Clerk of the Illinois Supreme Court, the Court was informed that Glass had filed no petition for leave to appeal from the appellate court's affirmance of his conviction and sentence.

> A 1 year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court. The limitation period shall run from the latest of—
>
> (A) the date on which the judgment became final by the conclusion of direct review or the expiration of the time for seeking such review;
>
> (B) the date on which the impediment to filing an application created by State action in violation of the Constitution or laws of the United States is removed, if the applicant was prevented from filing by such State action;
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> (C) the date on which the constitutional right asserted was initially recognized by the Supreme Court, if the right was newly recognized by the Supreme Court and made retroactively applicable to cases on collateral review;
>
> (D) the date on which the factual predicate of the claim or claims presented could have been discovered through the exercise of due diligence.

28 U.S.C. §2244(d)(1). The time during which a properly filed application for post-conviction or other collateral review is pending in the state courts is not counted toward any period of limitation. 28 U.S.C. §2244(d)(2).

In the present case, Glass alleges that he is entitled to relief because of ineffective assistance of counsel, unfitness to stand trial, denial of reasonable access to the courts, and suppression of favorable evidence by the prosecution. He makes no assertion that he was unable to discover his claims, that there is any newly recognized constitutional right, or that he was prevented from filing. Thus, this case does not involve the application of sub-sections (B), (C), or (D) above.

In the present case, Glass' direct attack on his conviction ended on January 27, 1993. He then waited until August 18, 1994 to file his petition for post-conviction relief in state court, which was more than 18 months after his direct attack was final. This filing stopped the clock from running until his petition for leave to file an appeal with the Illinois Supreme Court was denied on June 4, 1997. At this point, the clock once again began to tick. Glass' filing of his present petition did not occur until January 12, 1998, seven months after his state collateral attack was ultimately terminated.

In other words, this 7-month period plus the earlier 18-month period between the conclusion of his direct appeal and the filing of his post-conviction petition in the state courts exceeds the statutorily prescribed 1-year period of limitations after which a federal court cannot entertain a petition brought pursuant to §2254 by a prisoner in state custody.

Conclusion

Accordingly, Glass' Motion to Proceed in Forma Pauperis [#1] is DENIED, his Motion for Appointment of Counsel [#2] is DENIED, and his Petition for Writ of Habeas Corpus pursuant to §2254 [#3] is DISMISSED. This matter is now terminated.

ENTERED this 16th day of January, 1998.